

1955

Jane B. Carter v. George S. Spencer et al : Petition for Rehearing

Utah Supreme Court

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J. D. Skeen; F. R. Bayle; E. J. Skeen; Attorneys for Appellants;

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In the Supreme Court of the State of Utah

JANE B. CARTER, also known as
MRS. J. W. CARTER,

Plaintiff and Respondent

vs.

GEORGE S. SPENCER, GEORGE J. CANNON,
LAURENCE E. ELLISON, JAMES E. ELLISON,
MORRIS H. ELLISON, J. WM. KNIGHT,

Defendants and Appellants,

and

ELLISON RANCHING COMPANY, a Utah
Corporation, and ELLISON RANCHING
COMPANY, a Nevada Corporation,

Defendants

No. 8249

PETITION FOR REHEARING

J. D. SKEEN

F. R. BAYLE

E. J. SKEEN

Attorneys for Appellants

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In the Supreme Court of the State of Utah

JANE B. CARTER, also known as
MRS. J. W. CARTER,
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vs.

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LAURENCE E. ELLISON, JAMES E. ELLISON,
MORRIS H. ELLISON, J. WM. KNIGHT,
Defendants and Appellants,

and

ELLISON RANCHING COMPANY, a Utah
Corporation, and ELLISON RANCHING
COMPANY, a Nevada Corporation,
Defendants

No. 8249

PETITION FOR REHEARING

Come now the appellants above named and petition the
court for a hearing and reargument of the above cause upon
the following grounds, to-wit:

POINT I

THE COURT ERRED IN DISREGARDING THE MINUTES OF THE STOCKHOLDER'S MEETING WHICH AFFIRMATIVELY SHOW THAT THE RESPONDENT VOTED FOR REORGANIZATION OF THE ELLISON RANCHING COMPANY.

POINT II

THE COURT'S QUOTATION FROM THE RECORD DOES NOT SUPPORT THE STATEMENTS OF THE COURT THAT RESPONDENT WAS UNWILLING TO ACCEPT STOCK IN THE NEW CORPORATION.

POINT III

THE COURT FAILED TO CONSIDER THE PROPOSITION THAT BY REASON OF THE CONDUCT OF RESPONDENT'S PROXY SHE IS STOPPED FROM QUESTIONING THE VALIDITY OF THE REORGANIZATION.

POINT IV

THE COURT ERRED IN HOLDING THAT THE DIRECTORS ARE LIABLE FOR THE ACTION TAKEN BY THE STOCKHOLDERS.

POINT V

THE COURT MISCONSTRUED THE PURPOSE AND INTENT OF THE STIPULATION STATED BY THE TRIAL COURT.

POINT VI

THE COURT ERRED IN HOLDING THAT THE MEASURE OF DAMAGES IS THE SPECULATIVE VALUE OF THE CORPORATE ASSETS INSTEAD OF THE FAIR MARKET VALUE OF THE STOCK.

WHEREFORE, PETITIONER PRAYS THAT THE JUDGMENT AND OPINION OF THE COURT BE RECALLED AND A REARGUMENT BE PERMITTED OF THE ENTIRE CASE.

A BRIEF IN SUPPORT OF THIS PETITION IS FILED HEREWITH.

J. D. SKEEN

F. R. BAYLE

E. J. SKEEN

Attorneys for Appellants and Petitioners

E. J. SKEEN hereby certifies that he is one of the attorneys of record for the appellant and petitioner herein, and that in his opinion there is good cause to believe that the judgment and decision of the Court is erroneous and that the case should be reheard and reargued as prayed for in said Petition.

Dated this 9th day of August, 1955.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The appellants sincerely urge that the Court has not fully considered the facts in this case and has ignored fundamental legal principles which are properly applicable. For example, on page 2 of the mimeographed opinion, the Court made the following statement and underlined it:

that she (Jane B. Carter) stated her unwillingness to accept stock in the Nevada corporation for her stock in the Utah corporation."

The Court then states:

“This finding of fact is supported by the following testimony of James W. Carter, plaintiff’s proxy.”

The testimony of James W. Carter, quoted in the opinion, does not expressly or by implication, support the underlined statement of the Court. It merely is to the effect that the proxy *declined to vote* to subscribe to the articles of incorporation of the new corporation because the stock in the new corporation was assessable. The Court failed to point out in its opinion that the stock in the old corporation was like-wise assessable and ignored the well settled law that declining to vote did not legally establish the position of respondent as a dissenting stockholder. The points briefly alluded to above and the other points stated in the petition for rehearing will be discussed under the following headings:

1. The Court disregarded the minutes of the stockholders’ meeting.
2. The record does not support the Court’s conclusion that the respondent was a dissenting stockholder.
3. The Court did not consider the question of estoppel.
4. The directors were not guilty of a breach of trust.
5. The stipulation was misconstrued.
6. The Court ignored the well settled law as to the measure of damages.

POINT I

THE COURT DISREGARDED THE MINUTES OF THE STOCKHOLDERS’ MEETING.

The special meeting of the stockholders to consider re-organizing the Ellison Ranching Company under Nevada Law was held on May 29, 1952, at Layton, Utah. The official minutes of the meeting appear on pages 289 to 292 inclusive of the bound minute book, Exhibit P-8. Notes from which the minutes were prepared were taken by plaintiff's proxy, her son, James W. Carter. They were offered by defendant, marked P-2, and received in evidence. They are quoted on pages 6 and 7 of appellants' brief. The notes, Exhibit P-2, and the part of the official minute book, Exhibit P-8, devoted to the meeting of May 29, 1952 are entirely consistent. *They both show that plaintiff's proxy voted for the resolution attached to the notice of the meeting and the minutes.* No dissenting vote was recorded in the entire meeting. The only resolution upon which the plaintiff refrained from voting was the one relating to the form of articles of incorporation. The notes taken by Carter show the following:

"Mr. Carter present but not voting on this resolution."

This fact is recorded on page 292 of the official minute book.

This Court has apparently given no weight to the official minutes of the meeting or to the notes taken by Mr. Carter. It is undisputed that Carter acted as proxy for the respondent, and she was undoubtedly bound by his vote. If Carter was his mother's proxy his vote was her legal act. The vote is the significant legal act, not what Carter might have said after the stockholders' meeting adjourned.

The failure of this Court to recognize the fundamental rule that the vote of the stockholders present at a legally called meeting as recorded on the official minutes of the corporation establish the legal rights of the parties was serious error which

justifies the granting of a rehearing in this case. The statement in the opinion that the evidence as to what occurred at the meeting of May 29, 1952 "is hopelessly in conflict" is not supported by the record. The important thing which occurred, namely, the vote on the resolution for reorganization was recorded in the official minutes and in Carter's notes, and that vote for reorganization should have ended this lawsuit.

POINT II

PLAINTIFF WAS NOT A DISSENTING STOCKHOLDER.

As stated above, the record does not support a finding that the plaintiff voted against reorganization or even expressed, through her proxy at the stockholders' meeting, an unwillingness to go along with the plan outlined at the meeting. Her proxy simply refrained from voting to accept the proposed articles of incorporation of the new corporation. The authorities hold that refraining from voting constitutes assent. See 2 Cook on Corporation, 6th Ed. Section 671, p. 2016:

"A stockholder who takes part in and assents to the action of a stockholder's meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto and demand cash, *even though his assent was only by refraining from voting against the proposition.*"

See also, Carr v. Rochester etc. Co., 207 Pa. St. 392 and Martin v. Chute, 34 Minn. 135, 24 N. W. 353

The record is clear that Carter did not vote against a single proposition. The most he did was to refrain from voting on

the acceptance of the new articles because the stock was assessable. The stock in the old corporation was also assessable so he had no point there.

POINT III

THE COURT DID NOT CONSIDER THE QUESTION OF ESTOPPEL.

It is evident from the opinion that the Court did not consider the question of estoppel. This is a clear case for the application of that principle. Here are the essential elements:

1. The plaintiff voted for reorganization and for all of the propositions except the form of articles of incorporation. She refrained from voting on that proposition and that is deemed to be assent.

2. Carter said he would take the matter of the articles up with his mother and would notify the officers of the company of her attitude on the new articles. He did not communicate with them again.

3. The officers, in reliance upon the favorable vote on reorganization and upon the silence of Carter on the matter of approval of the new articles, proceeded to dissolve the Utah corporation and to organize a new corporation.

4. The plaintiff, although notified of the dissolution proceedings, failed to object.

5. After standing by for more than one year and four months with knowledge that there was reliance upon the favorable vote for reorganization, the plaintiff changed her position, claimed she was a dissenting stockholder and brought suit.

She was clearly estopped from changing her position after the company had acted in reliance upon (1) her vote for reorganization and (2) her silence in respect to the proceeding for dissolution.

This Court ignored completely this obvious estoppel.

POINT IV

THE DIRECTORS WERE NOT GUILTY OF A BREACH OF TRUST.

The Court's brief discussion of the question of personal liability of the directors indicates a lack of consideration of certain elementary legal concepts.

1. The ultimate source of corporate authority to act upon matters not delegated by the statute or the articles of incorporation, is the vote of the stockholders.

2. The board of directors acts within the authority vested in it by the statute, the articles of incorporation and by the stockholders.

3. The source of power to reorganize in the manner described in the resolution attached to the notice of the meeting of May 29, 1952, *was action of the stockholders.*

4. In the absence of fraud the directors of a corporation acting under the authority of a resolution of the stockholders are not liable to a non-consenting stockholder.

See 15 Fletcher Cyclopedia on Corporations, Perm. Ed. page 248, Section 7166

13 Am. Jur., Section 1225, page 1118

89 Am. St. R. 622

International G. N. Ry. Co. vs. Bremand, 53 Tex. 96
Holmes v. Crane, 182 N. Y. S. 270
3 Fletcher Cyc. Corp., Sec. 1021, p. 527

The Court has erred in holding that the directors are personally liable where admittedly (a) they had no part in the process of reorganizing other than to recommend that it be done (b) *the source of authority to act was the stockholders* and (c) there is no allegation or proof of any personal fraud or misconduct on the part of the directors. The Court has apparently not considered the authorities cited above which were not answered or distinguished by opposing counsel or by the Court.

POINT V

THE STIPULATION WAS MISCONSTRUED

Although the trial court's statement of the stipulation regarding the appraisal of the assets of the corporation is set forth in the opinion, this Court has failed to properly construe it. It will be observed that it provides, "that when that ascertainment is made, the court will apply the percentage of stock held by this plaintiff to the total outstanding at that time, and award to her that percentage of all assets as found by the three appraisers . . ."

This, in plain language, is that the award will be against the corporation for a percentage of the assets. *There is no mention in the stipulation of a personal judgment against the directors.*

It was never the intention of the defendants to waive their defense in the case. In fact the case had been submitted on the question as to whether there could be any recovery at all. See

Trans. pp. 111 and 173. Evidence was not offered on the question of damages and the stipulation was the substitute for that. On page 177 of the transcript appears the following:

“Mr. Skeen: There is no ruling made.

The Court: No ruling made.

Mr. Skeen: —pending that.

The Court: That’s right . . .”

The argument was made that because of the large amount of the appraisal (more than double the highest price ever paid for the stock of the Ellison Ranching Company) the appellants were not satisfied and that they are “hedging” on their stipulation. The appellants have never repudiated the stipulation but have contended that (1) the appraisal was not properly made but consisted simply of an arbitrary guess (See pages 22 and 23 of appellants’ brief) and (2) the Court did not follow the stipulation as it simply provides for an “award to her (of) that percentage of all assets as found by the three appraisers.” If the stipulation is to be followed fair play demands that it be followed as stated in the record. It is not fair to read into the stipulation something that is not there—namely an agreement for a personal money judgment against the directors.

That the appraisal was arbitrary becomes evident upon a perusal of pages 217 to 228 of the Record (Trans. 107-118). Mr. Morris H. Ellison testified as to the practical difficulties and large expense involved in gathering the livestock for sale. Mr. Ellison testified that the estimated expense of gathering the cattle would run from \$100,000 to \$150,000 and in addition there would be the cost of transporting and marketing them. There would, in case of liquidation, be a commission on the sale of land and livestock. The appraisers estimated the cost

of gathering at \$8,500 and included no item at all for transportation and selling costs. The unfairness of the appraisal is very obvious after reading Mr. Ellison's testimony. No basis for arriving at the number of animal units or the value per unit appears in the record. After hearing testimony the Court made some adjustments but they were entirely inadequate in view of Mr. Ellison's testimony.

POINT VI

THE COURT IGNORED THE WELL SETTLED LAW AS TO DAMAGES.

The rule as to the measure of damages in cases like the one before the Court is well stated in 13 American Jurisprudence, Section 1232, pages 1120-1121.

"The view has been taken that the market value of the stock governs in determining the appraisalment of preferred shares on consolidation or merger *and not a speculative value obtained by estimating the value of the several properties and rights of the corporation and dividing the same by the number of shares so as to obtain the value of each share.*"

(Emphasis added)

See also, Annotation 87 A. L. R. 602

The Court did not either follow the stipulation as pointed out above or follow the law. This Court has affirmed the decree without consideration of all of the facts and without application of the law discussed above.

It is respectfully submitted that the petition for rehearing should be granted.

J. D. SKEEN

F. R. BAYLE

E. J. SKEEN

Attorneys for Appellants